

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

LETICIA BADILLO,)	
)	No. CV-11-3082-CI
Plaintiff,)	
)	ORDER DENYING PLAINTIFF'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	AND GRANTING DEFENDANT'S
CAROLYN W. COLVIN, Acting)	MOTION FOR SUMMARY JUDGMENT
Commissioner of Social)	
Security, ¹)	
)	
Defendant.)	

BEFORE THE COURT are cross-Motions for Summary Judgment. (ECF No. 17, 19.) Attorney D. James Tree represents Leticia Badillo (Plaintiff); Special Assistant United States Attorney Robert L. Van Saghi represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (ECF No. 8.) After reviewing the administrative record and briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment, and directs entry of judgment for Defendant.

JURISDICTION

Plaintiff protectively filed for Title II disability insurance benefits (DIB) on September 26, 2006. Tr. 163. She alleged disability due to problems with heart illness, fatigue, medication

¹ Carolyn W. Colvin became Acting Commissioner of Social Security on February 14, 2013. Under FED. R. CIV. P. 25 (d), Carolyn W. Colvin is substituted for Michael J. Astrue as the Defendant. No further action need be taken to continue this suit. 42 U.S.C. § 405(g).

1 side effects, thyroid disorder and numbness in her left arm with an
2 amended onset date of February 1, 2006. Tr. 63, 168, 189. Her
3 claim was denied initially and on reconsideration. Plaintiff
4 requested a hearing before an administrative law judge (ALJ), which
5 was held on August 24, 2010, before ALJ James W. Sherry. Tr. 52-91.
6 Plaintiff, who was represented by an attorney, testified with the
7 assistance of an interpreter. Vocational expert Scott A. Whitmer
8 (VE) also testified. Tr. 30. The ALJ denied benefits on December
9 30, 2010, and the Appeals Council denied review. (Tr. 30-38, 1-9.)
10 The instant matter is before this court pursuant to 42 U.S.C. §
11 405(g).

12 STANDARD OF REVIEW

13 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
14 court set out the standard of review:

15 The decision of the Commissioner may be reversed only
16 if it is not supported by substantial evidence or if it is
17 based on legal error. *Tackett v. Apfel*, 180 F.3d 1094,
18 1097 (9th Cir. 1999). Substantial evidence is defined as
19 being more than a mere scintilla, but less than a
20 preponderance. *Id.* at 1098. Put another way, substantial
21 evidence is such relevant evidence as a reasonable mind
22 might accept as adequate to support a conclusion.
23 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the
24 evidence is susceptible to more than one rational
25 interpretation, the court may not substitute its judgment
26 for that of the Commissioner. *Tackett*, 180 F.3d at 1097;
27 *Morgan v. Commissioner of Social Sec. Admin.* 169 F.3d 595,
28 599 (9th Cir. 1999).

23 The ALJ is responsible for determining credibility,
24 resolving conflicts in medical testimony, and resolving
25 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
26 Cir. 1995). The ALJ's determinations of law are reviewed
27 *de novo*, although deference is owed to a reasonable
28 construction of the applicable statutes. *McNatt v. Apfel*,
201 F.3d 1084, 1087 (9th Cir. 2000).

27 It is the role of the trier of fact, not this court, to resolve

1 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
2 supports more than one rational interpretation, the court may not
3 substitute its judgment for that of the Commissioner. *Tackett*, 180
4 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
5 Nevertheless, a decision supported by substantial evidence will
6 still be set aside if the proper legal standards were not applied in
7 weighing the evidence and making the decision. *Browner v. Secretary*
8 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
9 there is substantial evidence to support the administrative
10 findings, or if there is conflicting evidence that will support a
11 finding of either disability or non-disability, the finding of the
12 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
13 1230 (9th Cir. 1987).

14 SEQUENTIAL EVALUATION PROCESS

15 The Commissioner has established a five-step sequential
16 evaluation process for determining whether a person is disabled. 20
17 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.
18 137, 140-42 (1987). In steps one through four, the burden of proof
19 rests upon the claimant to establish a prima facie case of
20 entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d
21 920, 921 (9th Cir. 1971). This burden is met once a claimant
22 establishes that a medically determinable physical or mental
23 impairment prevents him from engaging in his previous occupation.
24 20 C.F.R. §§ 404.1520(a), 416.920(a). "This requires the
25 presentation of 'complete and detailed objective medical reports of
26 his condition from licensed medical professionals.'" *Meanel v.*
27 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999)(citation omitted).

1 If a claimant cannot do his past relevant work, the ALJ
2 proceeds to step five, and the burden shifts to the Commissioner to
3 show that (1) the claimant can make an adjustment to other work; and
4 (2) specific jobs exist in the national economy which claimant can
5 perform. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v.*
6 *Heckler*, 722 F.2d 1496, 1497-98 (9th Cir. 1984).

7 **STATEMENT OF THE CASE**

8 The facts of the case are set forth in detail in the transcript
9 of proceedings and are briefly summarized here. Plaintiff, who
10 testified through an interpreter, was 36 years old at the time of
11 the hearing, married with three dependent children, and lived in a
12 house with her spouse and children. Tr. 61-62. Plaintiff testified
13 she spoke very little English; she had a ninth grade education in
14 Mexico and could read and write in Spanish. Plaintiff reported past
15 work experience as a fruit packer and sorter between 1997 and 2005.
16 Tr. 190. She testified she could no longer work due to chest pain,
17 fatigue, and left arm numbness. Tr. 65. She also stated she had
18 emotional problems due to her fear of having a heart attack. Tr.
19 68.

20 **ADMINISTRATIVE DECISION**

21 The ALJ first found Plaintiff met the DIB insured status
22 requirements through December 31, 2010. Tr. 32. At step one of the
23 sequential evaluation, he found Plaintiff had not engaged in
24 substantial gainful activity since July 1, 2006, the amended onset
25 date. *Id.* At step two, he found Plaintiff had severe impairments
26 of "chest pain syndrome; history of pericarditis; and gastritis/acid
27 dyspepsia." *Id.* Considering the four broad functional areas for
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1 evaluating mental disorders, the ALJ found mental impairments of
2 depression and/or anxiety, alone or in combination, did not cause
3 more than minimal limitations in her ability to work. Tr. 33. At
4 step three, the ALJ concluded Plaintiff's impairments or combination
5 of impairments did not meet or equal an impairment listed in 20
6 C.F.R. Part 404, Subpart P, Appendix 1 (Listings). Tr. 34.

7 At step four, the ALJ considered Plaintiff's symptoms and
8 determined Plaintiff had the physical residual functional capacity
9 (RFC) to perform the full range of light work and retained the
10 mental capacity to perform "simple, routine and repetitive tasks in
11 a low stress job with occasional decision making and occasional
12 changes in a work setting." Tr. 34.

13 The ALJ made detailed findings regarding Plaintiff's alleged
14 limitations and concluded her subjective complaints were not fully
15 persuasive. Tr. 35-36. Based on the RFC assessed and the VE's
16 testimony, the ALJ concluded Plaintiff could still perform her past
17 relevant work as a fruit packer as actually and generally performed.
18 Tr. 36-37. Proceeding to step five, the ALJ specifically noted
19 Plaintiff's inability to communicate effectively in English and
20 considered her as "an individual who is illiterate in English."² Tr.
21 37. Based on the RFC determination and VE testimony that the number
22 of other jobs she could perform would be reduced by 50 to 90 percent
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24 ² The Medical-Vocational Guidelines (Grids) explain that
25 illiteracy or the inability to communicate in English has the least
26 significance in "unskilled work," where the bulk of the work relates
27 to "things rather than data or people." 20 C.F.R. Subpt. P., App.
28 2, § 201.00(g).

1 due to the language barrier, he found there were other jobs in
2 significant numbers Plaintiff could perform. Those sedentary to
3 light level jobs were identified as housekeeper, cashier, parking
4 lot attendant, and dry cleaner, spotter. Tr. 37. The ALJ concluded
5 Plaintiff had not been disabled since the amended onset date through
6 the date of her decision and, thus, was ineligible for DIB benefits.
7 Tr. 38.

8 ISSUES

9 The question is whether the ALJ's decision is supported by
10 substantial evidence and free of legal error. Plaintiff identifies
11 the following errors: 1) improper rejection of the Plaintiff's
12 treating medical providers; (2) exclusion of depression as a "severe
13 impairment" at step two; (3) improper rejection of Plaintiff's
14 subjective complaints; (4) failure to fully develop the record; and
15 (5) reliance on vocational expert testimony that had no evidentiary
16 value. ECF No. 18 at 7-19. Plaintiff also asks the court to order
17 compliance with a Freedom of Information Act (FOIA) request. ECF
18 No. 18 at 19. Defendant argues the ALJ's findings are supported by
19 substantial evidence in the entire record and his decision is free
20 of legal error. ECF No. 20.

21 DISCUSSION

22 A. Credibility

23 When the ALJ finds a claimant's statements as to the severity
24 of impairments, pain, and limitations are not credible, he must make
25 a credibility determination with findings sufficiently specific to
26 permit the court to conclude the ALJ did not arbitrarily discredit
27 claimant's allegations. *Thomas v. Barnhart*, 278 F.3d 947, 958-959
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1 (9th Cir. 2002); *Bunnell v. Sullivan*, 947 F.2d 341, 345-46 (9th Cir.
2 1991) (en banc). If there is no affirmative evidence that the
3 claimant is malingering, the ALJ must provide "clear and convincing"
4 reasons for rejecting the claimant's allegations regarding the
5 severity of symptoms. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.
6 1998). The ALJ engages in a two-step analysis in deciding whether
7 to admit a claimant's subjective symptom testimony. *Smolen v.*
8 *Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996).

9 First, the ALJ must find the claimant has produced objective
10 medical evidence of an underlying "impairment," and that the
11 impairment or combination of impairments "could reasonably be
12 expected to produce pain or other symptoms." *Cotton v. Bowen*, 799
13 F.2d 1403, 1405 (9th Cir. 1986). Thus, medical evidence is a
14 relevant factor to consider in assessing credibility. *Social*
15 *Security Ruling (SSR)* 96-7p. Once the *Cotton* test is met, the ALJ
16 must evaluate the credibility of the claimant.

17 As ruled by the Ninth Circuit,

18 An ALJ cannot be required to believe every allegation of
19 disabling pain, or else disability benefits would be
20 available for the asking, a result plainly contrary to 42
21 U.S.C. § 423 (d)(5)(A). . . . This holds true even where
22 the claimant introduces medical evidence showing that he
has an ailment reasonably expected to produce some pain;
many medical conditions produce pain not severe enough to
preclude gainful employment.

23 *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). In addition to
24 ordinary techniques of credibility evaluation, the ALJ may consider
25 the following factors when weighing the claimant's credibility: the
26 claimant's reputation for truthfulness; inconsistencies either in
27 her allegations of limitations or between her statements and
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1 conduct; daily activities and work record; and testimony from
2 physicians and third parties concerning the nature, severity, and
3 effect of the alleged symptoms. *Light v. Social Sec. Admin.*, 119
4 F.3d 789, 792 (9th Cir. 1997); *Fair*, 885 F.2d 597 n.5. The ALJ may
5 also consider an unexplained failure to follow treatment
6 recommendations and testimony by the claimant "that appears less
7 than candid." *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir.
8 2008). The credibility assessment is the province of the ALJ and
9 "the court may not engage in second-guessing." *Thomas*, 278 F.3d at
10 959; *Fair*, 885 F.2d at 604.

11 Here, the ALJ summarized Plaintiff's testimony and relevant
12 medical evidence. Tr. 35-36. He found her testimony regarding
13 mental impairments and physical restrictions were not consistent
14 with the record or entirely credible. For example, he noted that
15 although she testified a worsening physical condition, the medical
16 evidence reflected improvement over the last two years. Tr. 35.
17 Specifically, he noted a July 2009 examination at which her treating
18 physician noted no exertional chest pain, pressure or abnormal
19 shortness of breath. The physician also reported that her
20 pericardial effusion had resolved. Tr. 485.

21 After discussing medical evidence that is inconsistent with the
22 level of severity claimed by Plaintiff, the ALJ gave other legally
23 sufficient reasons for partially discounting her subjective
24 symptoms. For example, he found the examining psychologist noted
25 objective evidence of symptom embellishment; her physician reported
26 her efforts to provide a written opinion that she could not work,
27 which he refused to provide; no treating physician opined her
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1 condition precluded work; the record included significant gaps in
2 treatment; and she did not present to her treating physicians as
3 "totally disabled." Tr. 36. While Plaintiff is correct that her
4 request to complete disability paperwork is frequently made, the
5 treating physician's refusal to do so reflects adversely on the
6 severity of Plaintiff's medical condition. In sum, the ALJ provided
7 sufficient specific, "clear and convincing" reasons for finding
8 Plaintiff's subjective complaints partially credible. *Burch v.*
9 *Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005); *Osenbrock v. Apfel*, 240
10 F.3d 1157, 1165, 1166 (9th Cir. 2001).

11 Plaintiff's reliance on *Regenniter v. Commissioner of Social*
12 *Sec. Admin.*, 166 F.3d 1294 (9th Cir. 1999), in her credibility
13 argument is misplaced. In *Regenniter*, the claimant had an 8 x 12 x
14 20 beam fall on his head while working at a construction site and
15 then suffered an accidental gunshot to his leg two years later.
16 *Id.* at 1296. His medically determinable impairments of depression,
17 post-traumatic stress disorder, headaches and panic attacks were
18 established by medical evidence consistent with his complaints. *Id.*
19 at 1206. The ALJ discounted *Regenniter's* complaints for not seeking
20 medical treatment even though it was established that he had
21 received regular treatment until his insurance ran out, he had no
22 income for many years, and had incurred thousands of dollars of
23 debt. *Id.* at 1296-97. The court rejected the ALJ's reasoning
24 because Plaintiff gave good reasons for not seeking additional
25 treatment, *i.e.*, he could not afford further treatment. *Id.* Here,
26 Plaintiff has failed to assert any reason for not pursuing
27 counseling recommended by her provider. Further, the record does
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1 not indicate that Plaintiff's depression had a significant impact on
2 her ability to maintain her household, engage in daily activities or
3 attend to her personal care. She was also capable of seeking
4 medication for depressive symptoms throughout the record. The ALJ's
5 finding that Plaintiff's failure to seek additional mental health
6 care erodes her allegations of severe depression is a clear and
7 convincing reason to discount allegations of disabling depression.

8 Plaintiff asserts the ALJ's reliance on the opinions of
9 examining psychologist Jay Toews, Ed.D., that Plaintiff may be
10 exaggerating or embellishing symptoms is error. ECF No. 18 at 15.
11 In support of her argument she references independent research on
12 malingering testing that she interprets as contradicting Dr. Toews'
13 interpretation of psychological testing administered to assess
14 credibility of self-reported symptoms. ECF No. 18 at 15; Tr. 20-22.
15 However, the inconclusive research provided does not impugn Dr.
16 Toews' opinions that Plaintiff's scores reflect "a tendency to
17 embellish or exaggerate" symptoms. Tr. 492. Dr. Toews did not find
18 affirmative evidence of malingering, as argued by Plaintiff. Tr.
19 491, 492.

20 As discussed above, without affirmative evidence of
21 malingering, the ALJ is required to give clear and convincing
22 reasons for discounting Plaintiff's allegations. His reasoning
23 meets this standard. The fact that some of the ALJ's reasons are
24 not permissible or supported by the record is not fatal where, as
25 here, others are legally sufficient. *Batson v. Comm. of Social Sec.*
26 *Admin.*, 359 F.3d 1190, 1197 (9th Cir. 2004)(erroneous reason to
27 reject credibility did not affect ALJ's decision where remaining
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1 reasons and ultimate credibility determination were adequately
2 supported by substantial evidence).

3 **B. Medical Opinions**

4 Plaintiff claims the ALJ erred in evaluating medical evidence
5 from her treating cardiologist, Anatole S. Kim, M.D.; emergency room
6 physician Douglas Coon, M.D.; and examining psychologist, Dr. Toews.
7 ECF No. 18 at 11.

8 **1. Dr. Toews**

9 As noted by Plaintiff, Dr. Toews' Mental RFC Assessment form
10 notes five moderate limitations in Plaintiff's mental functioning.
11 Tr. 498-99. Her argument that "none of these limitations were
12 included in the ALJ's RFC finding" is without merit. The record
13 shows that after summarizing Plaintiff's clinical interview and
14 objective test results, Dr. Toews concluded Plaintiff had excellent
15 memory and retention ability, and she could perform "a variety of
16 routine and repetitive types of work activity without difficulty."
17 Tr. 489-92. The ALJ specifically referenced Dr. Toews' narrative
18 opinion that Plaintiff exhibited some difficulty in functioning due
19 to mental health symptoms and properly relied on his narrative
20 opinion that she could perform work. Tr. 35. *Crane v. Shalala*, 76
21 F.3d 251, 253 (9th Cir. 1996). Further, considering the ALJ's
22 specific credibility findings, the final RFC determination
23 sufficiently addresses moderate functional limitations identified,
24 20 C.F.R. §§ 404.1527(e), 416.927(e) (no special significance is
25 given to a medical source opinion regarding final RFC
26 determination); *Magallanes v. Bowen*, 881 F.2d 747, 755 (9th Cir.
27 1989) (reviewing court can draw legitimate inferences relevant to
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1 the medical source's opinion from the adjudicator's decision). For
2 example, to accommodate limitations in concentration, social
3 interaction, and adaptation identified by Dr. Toews and supported by
4 the evidence, the ALJ reasonably restricted Plaintiff to low stress
5 unskilled work, occasional decision making, and occasional changes
6 in the work setting. Tr. 34-36. Plaintiff's contention that Dr.
7 Toews' opinions were not incorporated in the RFC determination
8 fails.

9 **2. Dr. Coon**

10 Plaintiff contends the ALJ disregarded Dr. Coon's opinion,
11 asserting that he "diagnosed her with anxiety." ECF No. 18 at 10.
12 However, the record shows Dr. Coon saw Plaintiff once during an
13 emergency room visit when Plaintiff was experiencing chest pain. He
14 did not make a formal diagnosis of "anxiety." Tr. 320-321. Rather,
15 he reported a clinical impression of "acute anxiety and atypical
16 chest pain" based on his observations at admission. Tr. 320. Chart
17 notes indicate Plaintiff exhibited no distress when the chest pain
18 was relieved and Plaintiff was "smiling and walking without
19 difficulty" upon discharge. Tr. 324. Emergency room records
20 document that Ativan was administered at the time to relieve
21 symptoms, but it was not prescribed for ongoing treatment.³ No
22 prescriptions were ordered. Tr. 320. Dr. Coon's one time
23 "discharge diagnosis" of acute anxiety accompanying atypical chest
24 pain during emergency room treatment does not rise to the level of
25 medical evidence to establish a medically determinable mental

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27 ³ The record shows Plaintiff's prescriptions at the time of the
28 hearing were for thyroid, cholesterol, and sleep problems. Tr. 487.

1 impairment. See 20 C.F.R. § 404.1508 (mental impairment must be
2 shown by acceptable diagnostic techniques and last or be expected to
3 last 12 months). The ALJ was not required to reject Dr. Coon's
4 reference to anxiety symptoms during urgent care, as it is not
5 significantly probative to support a finding that anxiety is a
6 medically determinable mental impairment. *Vincent on Behalf of*
7 *Vincent v. Heckler*, 739 F.2d 1393, 1394-95 (1984).

8 **3. Dr. Kim**

9 Plaintiff's argument that the ALJ erred by disregarding Dr.
10 Kim's observation she "appeared clinically depressed" is also
11 without merit. ECF No. 18 at 10; Tr. 448. Dr. Kim is a heart
12 specialist to whom Plaintiff was referred by Plaintiff's treating
13 physician, Dr. Forster, in 2006. See Tr. 257. Dr. Kim diagnosed
14 and treated Plaintiff for pericardial effusion until it was resolved
15 in February 2008. Tr. 446-48. In April 2008, during a follow-up
16 visit, Plaintiff complained of headaches and insomnia due to chest
17 pain. She also expressed anxiety over her sister's recent injury
18 that resulted initially in a coma and then confined the sister to a
19 wheelchair. Tr. 447. During Dr. Kim's examination, Plaintiff
20 reported she did not go back to work because her family decided she
21 was too ill; she also reported she was babysitting a friend's two
22 and a half year old, three to four times a week, and another child
23 for a couple hours after school. Tr. 448.

24 In his clinic note, Dr. Kim reported he could find no cardiac
25 etiology for Plaintiff's chest pain. Tr. 448-49. This opinion was
26 credited by the ALJ and supports the finding that Plaintiff's
27 pericarditis was resolved. Tr. 32. Dr. Kim also noted he did not
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1 have a longitudinal relationship with Plaintiff, but his impression
2 was that she was "clinically depressed." Tr. 448. He deferred
3 further work-up for non-cardiac etiology to Dr. Forster. *Id.*

4 Dr. Kim's conclusory impression regarding Plaintiff's mental
5 health does not rise to the level of a medically acceptable opinion.
6 SSR 96-2p (only well-supported opinions based on sound medical
7 techniques can establish the existence of an impairment); see *Young*
8 *v. Heckler*, 803 F.2d 963, 968 (9th Cir. 1986) (brief, conclusory,
9 unsupported treating physician opinion disregarded). Dr. Kim is not
10 a mental health specialist, and the medical record confirms he did
11 not have a long treating relationship with Plaintiff. His
12 interpretation of Plaintiff's mental state based on her presentation
13 during one visit is not probative to the disability determination.
14 Reversal is not warranted due to the ALJ's disregard of Dr. Kim's
15 conclusory impression regarding Plaintiff's mental health. *Vincent*,
16 739 F.2d at 1395 (only significant probative evidence must be
17 discussed and rejected by ALJ).

18 **C. Step Two: Severe Mental Impairment**

19 Plaintiff argues the ALJ erred at step two when he concluded
20 Plaintiff's depression is "non severe." The fact that a medically
21 determinable condition exists does not automatically mean the
22 symptoms are "severe," or "disabling," as defined by the Social
23 Security regulations. See, e.g., *Edlund*, 253 F.3d at 1159-60; *Fair*
24 *v. Bowen*, 885 F.2d 597, 603 (9th cir. 1989); *Key v. Heckler*, 754 F.2d
25 1545, 1549-50 (9th Cir. 1985). To establish severity, the evidence
26 must show the diagnosed condition significantly limits a claimant's
27 physical or mental ability to do basic work activities. 20 C.F.R.

1 § 416.920(c).

2 Here, the ALJ identified depression and/or anxiety as mental
3 disorders and properly evaluated the evidence as required by 20
4 C.F.R. § 404.1520a. Specifically, he considered the major function
5 areas to determine severity at step two (activities of daily living,
6 social functioning, concentration, persistence or pace; and episodes
7 of decompensation). Tr. 33. In support of his step two findings,
8 the ALJ found Plaintiff did not indicate depression as an impairment
9 in her application for benefits or report symptoms of anxiety or
10 depression at her consultative psychological evaluation in October
11 2010. The ALJ also found no evidence of significant limitations
12 caused by mental problems in Plaintiff's self-reported daily
13 activities, *i.e.*, cleaning, shopping, cooking managing her household
14 or caring for herself. For example, the record includes self-
15 reported ability to get along well with others and handle changes
16 without a problem. *Id.*, Tr. 176, 180. Regarding limitations in
17 concentration, persistence or pace, the ALJ's step two finding that
18 medical evidence does not establish a significant mental limitation
19 is supported by the record. As discussed above, Dr. Toews did not
20 find evidence to establish a diagnosis of depression; and one-time
21 observations by Dr. Coon (emergency room physician) and Dr. Kim
22 (treating cardiologist) are insufficient to establish severity. 20
23 C.F.R. § 404.1508 (claimant must provide medical evidence consisting
24 of signs, symptoms, and laboratory findings required to establish
25 step two severity).

26 Independent review reveals other substantial evidence to support
27 the ALJ's finding of non-severity. *See Warre v. Commissioner of*
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1 *Social Sec. Admin.*, 439 F.3d 1001, n.3 (9th 2006) (additional support
2 for ALJ's position may be noted by reviewing court). For example,
3 no evidence of treatment is presented, and as found by the ALJ,
4 Plaintiff did not report symptoms or limitations caused by a mental
5 condition to the examining psychologist. At the hearing, through
6 an interpreter and in response to her representative's questions,
7 Plaintiff reported she cries sometimes when thinking about her
8 physical impairment, and sometimes lacks energy. Tr. 68. She also
9 testified left arm pain restricted some activities. Tr. 65. These
10 self-reported subjective symptoms, without more, are insufficient to
11 establish step two severity. 20 C.F.R. § 404.1508 (statement of
12 symptoms does not establish an impairment). The ALJ did not err in
13 finding depression non-severe.

14 Even if depression were severe as defined by the Regulations,
15 failure to identify it as such at step two is harmless here because
16 Plaintiff has failed to show she was prejudiced by the alleged error.
17 *Shineski v. Sanders*, 556 U.S. 396, 409-10 (2009) (burden of showing
18 harm from error in administrative proceedings falls on plaintiff);
19 see also *Stout v. Commissioner, Social Sec. Admin.*, 454 F.3d 1050,
20 1056 (9th Cir. 2006) (error harmless where no prejudice shown); *Johnson*
21 *v. Shalala*, 60 F.3d 1428, 1436 n.9 (9th Cir. 1995) (error is harmless
22 if correction would not alter result).

23 It is the sole responsibility of the ALJ to determine the most
24 a claimant can still do despite her physical and/or mental
25 limitations. 20 C.F.R. § 416.945(a)(1); 20 C.F.R. § 416.946(c); see
26 also *SSR 96-5p*. As reflected by the record and the final RFC
27 determination, the ALJ considered self-reported non-exertional
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1 symptoms attributed to depression in steps two through five and
2 addressed mental limitations identified by Dr. Toews in his
3 narrative report and summary mental RFC assessment. Tr. 33, 35, 36.
4 At step four, although he discounted Plaintiff's subjective
5 complaints, he explicitly gave her the benefit of the doubt regarding
6 mental limitations alleged and restricted her to simple tasks, a low
7 stress job with occasional decision-making, and occasional changes
8 in the work setting to address psychological symptoms reported by
9 Plaintiff. Tr. 34, 36. Plaintiff offers no medical evidence that
10 these non-exertional restrictions are inadequate to accommodate
11 mental impairments supported by the record. *Lewis v. Astrue*, 498
12 F.3d 909, 911 (9th Cir. 2007). The ALJ's findings reflect a rational
13 interpretation of the entire record, including Dr. Toews' narrative
14 opinion that Plaintiff is capable of routine and repetitive work.
15 Tr. 492. Without a showing of prejudice, the claimed alleged step
16 two error is harmless. *Shineski*, 556 U.S. at 409-10.

17 **D. Duty to Develop the Record**

18 Plaintiff next argues this case should be remanded for a second
19 consultative examination with a Spanish speaking psychologist. ECF
20 No. 18 at 17-18. This argument is unpersuasive. As acknowledged by
21 Plaintiff's representative at the hearing, although a Spanish
22 speaking examiner may be preferable, the decision as to whether one
23 is needed is the responsibility of the agency. Tr. 89-90; 20 C.F.R.
24 § 404.1519. Further, the regulations specifically identify "language
25 barrier" as a factor considered by the agency in choosing an
26 examining medical source. See 20 C.F.R. § 404.1519j. There is
27 nothing in the record to indicate this factor was disregarded by
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1 agency administrators who arranged the requested psychological
2 evaluation.

3 Although Plaintiff argues that a Spanish speaking examiner is
4 required in this case, she cites to no authority for this
5 proposition. She does not reference evidence in the record or
6 present new evidence that supports her assertion more testing is
7 required. Speculation that a Spanish speaking psychologist would
8 have different or more favorable opinions regarding a claimant's
9 mental impairments is not a sufficient cause for remand.

10 The record shows Dr. Toews conducted a detailed interview with
11 Plaintiff and his recital of Plaintiff's self-reported symptoms,
12 family history, past work, activities of daily living, and psycho-
13 social history is consistent with the entire record. There is
14 nothing to indicate information given or received was lost in
15 translation. Significantly, Dr. Toews commented on Plaintiff's low
16 visual memory scores as being "due to cultural factors," indicating
17 awareness and consideration of cultural barriers. It is also noted
18 on independent review that Plaintiff reported attending English as
19 a Second Language (ESL) classes in the United States and listed
20 reading books in English as one of her hobbies. Tr. 490, 208.
21 Finally, Plaintiff's scores on objective testing were excellent,
22 results that support Dr. Toews' finding Plaintiff had no difficulty
23 understanding test instructions or items. Tr. 490. Regarding
24 Plaintiff's symptoms, consistent with her hearing testimony,
25 Plaintiff told Dr. Toews she felt "tired and weak," and had
26 difficulty falling asleep. Tr. 490. Objective test results revealed
27 no memory problems (an indicator that she could follow instructions),
28

1 and Dr. Toews observed normal mood and affect, noting she was "quite
2 pleasant and cooperative." *Id.* Plaintiff provides no evidence of
3 recommended treatment for clinical depression that contradicts Dr.
4 Toews observations and conclusions. Viewed in its entirety, the
5 record does not support Plaintiff's argument that her consultative
6 examination with Dr. Toews was inadequate to develop the record
7 fully.

8 **E. Reliance on VE Testimony**

9 Plaintiff argues the ALJ's failure to include left arm pain and
10 limitations assessed by Dr. Toews in hypotheticals posed at steps
11 four and five rendered VE testimony without evidentiary value. ECF
12 No. 18 at 19-20. As discussed above, the weight given Dr. Toews'
13 opinions and limitations included in the ALJ's final RFC
14 determination is supported by substantial evidence and without legal
15 error. Regarding left arm pain, the hearing transcript indicates
16 Plaintiff's representative included "a left arm impairment" in his
17 hypothetical to the VE and speculated that it could limit an
18 individual to "less than occasional" use. Tr. 84. However, an ALJ
19 does not have to accept as true the limitations propounded by
20 plaintiff's counsel but unsupported by the record. *Osenbrock v.*
21 *Apfel*, 240 F.3d 1157, 1164 (9th Cir. 2001). As found by the ALJ,
22 there is no medical evidence to establish a left arm impairment or
23 an etiology to left arm restrictions alleged by Plaintiff. Tr. 35.
24 Plaintiff's statements and her representative's speculation
25 concerning left arm impairment are insufficient to establish a
26 disabling limitation. 20 C.F.R. § 404.1528; *Ukolov. V. Barnhart*, 420
27 F.3d 1002, 1005 (9th Cir. 2005) (claimant's perception of his problems
28

1 do not support a finding of impairment).

2 The ALJ also discussed limitations in Plaintiff's English
3 illiteracy and their effect on her ability to perform past work as
4 an agricultural packer and sorter. He properly factored Plaintiff's
5 language barrier into his hypothetical questions to the VE, who
6 identified specific jobs that could be performed with a limited
7 ability to speak English. See Tr. 37, 76, 77, 78. Consistent with
8 the VE's testimony, the ALJ found not only could Plaintiff perform
9 past work, but also she was capable of performing other jobs whose
10 occupational base was reduced by her inability to communicate
11 effectively in English. The ALJ did not err in relying on VE
12 testimony.

13 The ALJ's interpretation of the medical evidence in the entire
14 record and application of relevant legal standards at steps four and
15 five are reasonable and supported by substantial evidence.

16 **F. FOIA Request**

17 Plaintiff appears to ask this court to order production of
18 documents she requested under the FOIA. To seek judicial relief
19 under the FOIA, Plaintiff must comply with the provisions of 5 U.S.C.
20 § 552 (a)(4)(B). Plaintiff presents neither facts nor legal
21 authority to support a FOIA review in these proceedings.

22 **CONCLUSION**

23 The ALJ's decision is based on substantial evidence and free of
24 legal error. The record is fully developed and supports in its
25 entirety the ALJ's denial of benefits. Accordingly,

26 **IT IS ORDERED:**

27 1. Plaintiff's Motion for Summary Judgment (**ECF No. 17**)
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1 pursuant to 42 U.S.C. § 405(g) is **DENIED**. To the extent her Motion
2 includes a claim for injunctive relief under the FOIA, it is **DENIED**.

3 2. Defendant's Motion for Summary Judgment (**ECF No. 19**) is
4 **GRANTED**.

5 The District Court Executive is directed to file this Order and
6 provide a copy to counsel for Plaintiff and Defendant. The file
7 shall be closed and judgment entered for Defendant.

8 DATED April 24, 2013.

9
10 S/ CYNTHIA IMBROGNO
11 UNITED STATES MAGISTRATE JUDGE
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